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In the

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

Appellant,

V.

PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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Pursuant to Rule 42 of the Rules of the Supreme Court, the New York State Consumer Protection Board (hereinafter referred to as CPB) and the National Association of State Utility Consumer Advocates (hereinafter referred to as NASUCA) respectfully move for leave to file the accompanying brief in this case as *amicus curiae.* While the attorney for the appellee has consented to the filing of a brief *amicus curiae* by the CPB and NASUCA, the attorney for the appellant, Consolidated Edison Company, has refused to consent.

The New York State Consumer Protection Board, as part of the Executive Department of the State of New York, is mandated to coordinate and perform a wide range of consumer protection functions for the consumers of the State of New York. The CPB has the power and duty, *inter alia,* to conduct investigations, research, studies and analyses of matters affecting the interests of consumers; to represent the interests of consumers of the state before federal, state, and

local administrative and regulatory agencies; to study the operation of consumer protection laws; and to cooperate with and assist consumers in class actions. N.Y. Exec. Law §553.

In addition to these statutory responsibilities, the CPB has the authority to initiate, intervene in, or participate in any proceedings before the Public Service Commission. N.Y. Exec. Law §553(2)(c). The CPB is also authorized to seek judicial review of any final decision of the Public Service Commission involving the establishment of rates, where the CPB was a formal party to the administrative proceeding. Session Laws of New York, ch. 120 (1978). Pursuant to this authority, the CPB has participated in over fifty cases over the last four years involving the establishment of policy or rates for regulated gas, electric and telephone utilities.

The CPB has also filed a brief as *amicus curiae* in two other cases before this Court. In both cases, this Court granted the CPB's motions for leave to file briefs as *amicus curiae* even though the opposing parties in both cases refused to consent to the filing of the briefs. *Judice v. Vail*, 97 S.Ct. 251 (1976) and *Flagg Brothers v. Brooks*, 98 S.Ct. 714 (1978).

The CPB actively participated in the administrative proceedings before the Public Service Commission where the order which is the subject of this case was issued. The order prohibited the use of bill inserts on controversial matters and barred the recovery in utility rates of the cost of specific types of advertising. The CPB filed written comments in September, 1976 supporting a restriction on utility advertising and filed a petition for rehearing on March 28, 1977 regarding those parts of the order the CPB objected to (Appellant's Brief, p. 5).

The National Association of State Utility Consumer Advocates is an association of independent state agencies responsible for representing utility consumer interests before state or federal regulatory agencies. The members of NASUCA actively participate in utility regulatory proceedings in their respective states by presenting technical witnesses, cross-examining utility witnesses, briefing legal and technical issues, and obtaining judicial review of adverse administrative

decisions where appropriate. NASUCA consists of state consumer advocates from twenty-two states, the District of Columbia, and Guam. The CPB is a member of NASUCA.

In this case, the CPB and NASUCA have an interest in ensuring that utility consumers are not forced to subsidize the dissemination of the controversial views of utility managements to a captive audience. In addition, as on-going participants in the regulatory process, the movants have a keen interest in preserving the bill insert mechanism for the communication of reliable and factual service-related information.

As experts in utility regulation, the CPB and NASUCA want to add to the legal arguments presented by the appellee, Public Service Commission of the State of New York (PSC), an analysis of the state's duty to protect ratepayers from overreaching by state-authorized monopolies. We submit that this governmental interest is central to the PSC's authority to bar the use of bill inserts by utilities to promote their controversial views on matters of public policy. Neither the brief filed in the New York Court of Appeals by the PSC nor the draft brief *amicus curiae* of the Natural Resources Defense Council, Inc. et al. discusses this argument in detail.

We, therefore, submit that the CPB and NASUCA have a significant interest in the case before this Court, as well as expertise in utility regulation which enables the movants to present a brief *amicus curiae* that will aid the Court in its deliberation.

Date: December 13, 1979

Respectfully submitted,

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SUMMARY OF ARGUMENT

The Public Service Commission of the State of New York (PSC or Commission) did not abridge the First Amendment rights of Consolidated Edison (Con Edison) by holding that utilities subject to the Commission's jurisdiction may not use the bill insert mechanism to communicate the utilities' views on controversial matters of public policy. The order of the Court of Appeals holding that no First Amendment rights were violated should be affirmed.

The Commission action is an appropriate exercise by the state of its governmental interest and duty to protect ratepayers to the maximum extent possible from the consequences of the state's grant of monopoly power to a private enterprise. Con Edison has an unquestioned right to express its views on controversial matters by using its own (stockholders') money and through the ordinary means available to all persons. However, it does not have the right to transform its statutory duty to inform ratepayers about service-related matters through the bill insert medium, which ratepayers are forced to support and receive, into a First Amendment forum.

The Commission acted properly in preventing the dissemination of controversial matters in the bill insert because the Constitution forbids entities with government-conferred power from forcing individuals to provide financial support for political positions with which they do not agree. The cost of producing and mailing the bill insert is borne by rate-payers and the use of the insert for dissemination of the utilities' views would amount to an unconstitutional forced subsidy of the utilities.

In addition, the Commission action was proper to protect captive ratepayers, who are as a practical matter compelled by the state monopoly franchise to deal with the utility assigned to their service area. Because this 'captive' status is the direct result of government franchise, the state has a special duty to protect the privacy rights of the ratepayers.

The Commission applied its ban on controversial matter evenhandedly. Recognizing that permitting utilities to express controversial views would have given rise to a requirement that persons with opposing views be given access to the bill insert,

the Commission ordered that neither utilities nor those with opposing views could use the bill insert for controversial issues. By taking this action, the Commission preserved the bill insert mechanism for the communication of service-related, neutral information.

ARGUMENT

I. THE STATE HAS A DUTY TO PROTECT RATEPAYERS FROM THE ABUSE BY UTILITIES OF THE BILL INSERT MECHANISM.

Con Edison is a utility operating under a state-authorized monopoly to sell electricity, gas and steam to virtually all of the residential, commercial and industrial customers within its service area. The utility claims a First Amendment right to disseminate its views on controversial matters of public policy through the use of bill inserts, a medium of communication which ratepayers are compelled to finance and receive. Specifically, Con Edison argues that its right of free speech was unconstitutionally abridged by an order of the New York Public Service Commission (Commission or PSC) prohibiting utilities subject to its jurisdiction from using bill inserts "as a mechanism for the dissemination of the utility's position on controversial matters of public policy." (J.S. App. 57a).

The right asserted by Con Edison to exercise its free speech through the bill inserts does not exist. In fact, the PSC order which is the subject of this challenge is an appropriate exercise by the state of its governmental interest and duty to protect ratepayers to the maximum extent possible from all of the consequences of the compulsion involved in the exceptional grant by the state of monopoly power to a private enterprise. As the Commission stated in its order denying petitions for rehearing:

> Utility bill inserts are not newspapers which, in principal, any person is free to publish and thereby make his opinions known to the public. *The privilege to disseminate utility bill inserts derives from the privilege of franchised monopoly, conferred by the government. It can, therefore, be regulated by the government to assure that it is exercised in the public interest.* (J.S. App. 67a; emphasis added).

Monopolies are generally against the public policy of the United States and the State of New York. N.Y. Gen. Bus. Law §340; Sherman Anti-Trust Act, 15 U.S.C. §§1,2, (1973). However, Con Edison and other utilities subject to the jurisdiction of the PSC are permitted to operate as monopolies because of a determination by the state that the public interest is served by generally protecting them from competition. 2 A. Kahn, The Economics of Regulation 113-171 (1971).

This exceptional grant of power to a private enterprise by the state carries with it a correlative duty on the part of the state to protect ratepayers from what could otherwise be excessive rates and other forms of overreaching by the monopoly enterprise.* The duty to protect ratepayers arises from the fact that ratepayers are forced to deal with the authorized utility in order to receive a necessity of life, or not receive it at all. *Slaughter House Cases* 83 U.S. 36 (1873); *Nebbia v. New York* 291 U.S. 502, 529, 531 (1933); *Rochester Gas and Electric Company v. Public Service Commission* 66 App. Div. 2d 509, 512, N.Y.S. 2d 754, 756, (1979); c.f. *Munn v. Illinois* 94 U.S. 113 (1876). Part of the compulsion of the ratepayers to deal with the authorized utility is, of course, the requirement that services received are paid for. Therefore, the entire bill payment system — meters, meter-reading, bill mailings

*The New York State Public Service Commission has the authority to supervise all gas and electric corporations; to prescribe uniform methods of accounts, records and books to be observed by gas and electric corporations; to require the filing of detailed annual reports; to enter in and inspect the property of gas and electric corporations; to examine their books, contracts, documents; and to fix the rates gas and electric corporations can charge. N.Y. Pub. Serv. Law §66. The PSC also has the responsibility of approving the use of the utility's revenues (N.Y. Pub. Serv. Law §107) and of approving the dissolution of a gas or electric corporation or a change in its Certificate of Incorporation (N.Y. Pub. Serv. Law §108). Furthermore, the legislation also gives the PSC "all powers necessary or proper to enable it to carry out the purposes of this chapter". N.Y. Pub. Serv. Law §4.

and bill inserts — is supported by ratepayers under Commission rules permitting recovery of necessary operating expenses. Uniform System of Accounts — Expense Accounts — Customer Account Expenses, 16 N.Y.C.R.R., Vol. A, §§901—906.

The PSC has determined that the bill insert is a convenient and efficient method of communicating important service-related information to utility customers. For example, every electric corporation must advise its customers of procedures available to register complaints regarding service or disputed bills. 16 NYCRR §143.9. Commission rules also require that most utilities "furnish to their customers a narrative description of the essential elements affecting them of each proposed major rate change, by bill inserts . . . " 16 NYCRR §136.80. In its February 27, 1977 Statement of Policy, the subject of this challenge, the Commission found that bill inserts were appropriate for,

> appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates, new billing practices, or new inspection or meter reading schedules; advice concerning hazards associated with the utility's service; reports on matters of interest to the public concerning the utility's service — such as service difficulties and progress in overcoming them, projections of new capacity additions, plans for new or improved means of providing service, and the like. (Policy Statement, J.S. App. 44a).

Each of the subjects listed by the Commission are neutral or non-controversial in the sense that they are related to the service provided by the utility. That is not to say that all ratepayers would necessarily agree with all of the information that would be contained in the inserts under the PSC's Statement of Policy. Some might not agree, for instance, about the need to conserve scarce resources and most would not welcome information about new rates. But the standard that emerges from the Commission's policy statement is

whether the information is useful to the recipient as a ratepayer and user of utility services.

In contrast, Con Edison is seeking to use the bill inserts to communicate with recipients not as ratepayers, but in their other capacities, particularly as citizens. For example, the review culminating in the contested order was initiated, in part, in response to a complaint against a Con Edison bill insert promoting nuclear power. The insert, entitled "Energy Independence is Still a Goal, and Nuclear Power is Needed To Win the Battle" (A. 34—37), advocated nuclear power, disparaged its critics and touted its safety. The utility has no constitutional right to transform its statutory duty to inform ratepayers about service-related matters into a First Amendment right to speak to citizens about such controversial issues of public policy determination.

Con Edison, of course, has an unquestioned right to express its controversial views to citizens. However, the facts of this case are not similar to *First National Bank of Boston v. Bellotti* 435 U.S. 765 (1978), which is relied upon so strongly by Con Edison. In that case, the Court found an unconstitutional abridgment of free speech when state law prohibited a corporation from using its own money to express by ordinary means its views on general political issues. The PSC order under challenge here in no way prevents a utility from expressing its political views in any forum available to other businesses or individuals. Rather, Con Edison's complaint is that the Commission failed to consecrate to Con Edison's use an additional ratepayer-subsidized medium of communication.

II. CON EDISON DOES NOT HAVE A FIRST AMENDMENT RIGHT TO A SUBSIDIZED FORUM IN WHICH TO DISSEMINATE ITS CONTROVERSIAL VIEWS.

Con Edison argues that "the sending out of the bill inserts will not cost the ratepayers one cent more than the rates they already pay . . . . The fact that the utilities may incidentally save money by the use of bill inserts, at no expense to the ratepayers, is not detrimental to the ratepayers or the public." (Appellant's Brief, p. 21). This formulation asks the wrong question and arrives at the wrong answer. As the Appellate Division of the Supreme Court of New York stated in its decision in this case,

> That the mailing would not cost the consumers anything is irrelevant since the issue is whether management's costs will be reduced through customer subsidy. In the battle of ideas, the utilities are not entitled to require the consumers to help defray their expenses. (J.S. App. 19a).

The Constitution forbids entities with government-conferred power from forcing individuals to provide financial support for political positions with which the individuals do not agree. *Abood v. Detroit Board of Education* 421 U.S. 1 (1976). In *Abood,* the Court held that a union, a state-designated exclusive bargaining agent, could be prevented under the First and Fourteenth Amendments from "spending a part of [the members'] required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Abood,* supra at 234. The instant case clearly parallels *Abood.* In both cases, money collected as a direct result of power conferred by government would have been used to promote the political views of the party collecting the money. And, in both cases, this misuse of the power conferred is prohibited by the Constitution.

III. CON EDISON DOES NOT HAVE A FIRST AMENDMENT RIGHT TO DISSEMINATE ITS CONTROVERSIAL VIEWS TO ITS CAPTIVE RATEPAYERS.

The Commission's Statement of Policy noted that the use of bill inserts to communicate a utility's position on controversial matters is "tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the the utility's message." (J.S. App. 43a) The New York Court of Appeals, in upholding the Commission's order said, "Consumers of utility services, like many others in captive situations, have no choice concerning receipt of a periodic statement from the power company." (J.S. App. 10a). Implicit in these statements is the recognition that the customer's 'capativity' is the direct result of the state having compelled the customer to deal with a given utility. It is in this context of state-enforced 'captivity' that the ratepayer's right to privacy should be examined.

Con Edison does not dispute that its views on controversial matters such as nuclear power might be offensive to customers, but dismisses this as an "insignificant infringement" because the customer "is not forced to read [the] message and may discard it as quickly as he or she wishes." (Appellant's Brief, pp. 18, 19) This ignores the vital statutory function that the billing mechanism is intended to serve. A customer, first of all, cannot discard the communication unopened, as in the case of junk mail; he or she must open it in order to pay the bill. Second, a customer can only acquire the important information on safety, tariff changes, complaint procedures, etc. required by statute, order, and regulation if the customer reads some portion of each article to ascertain its subject matter.

Contrary to Con Ed's apparent assumption, the First Amendment does not guarantee the right to communicate with unwilling recipients. "[T]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Rowan v. Post Office Department* 397 U.S. 728, 736 (1970). This is especially true when the offensive material is sent through the mails, violating the privacy of the

home: "We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. . . . The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain." *Rowan,* supra at 738.

Con Edison would distinguish *Rowan* on the ground that it stands for the proposition that "the decision as to whether a given communication is to be received at home is a judgment for each person to make, not one for the State to impose . . ." (Appellant's Brief, p. 19). But in the instant case, the customer cannot avoid the communication without forfeiting his right to receive important service-related information.

Nor, says Con Edison, does *Rowan* involve speech which is "at the core of the First Amendment." (Appellant's Brief, p. 19). yet individuals are not protected only from shocking speech in their homes. In *Lehman v. City of Shaker Heights* 418 U.S. 298 (1974), a restriction on the same type of speech involved in the instant case (political speech) was upheld where it was directed at a captive audience, riders of publicly-owned transit. *Lehman* recognized the importance of protecting a captive audience from unwanted expressions, even outside the home, where the forum used is primarily dedicated to another, incompatible use.

The opinion of Mr. Justice Blackmun, announcing the judgment of the Court in *Lehman* said, "No First Amendment forum is here to be found" and noted that the city had limited access to transit advertising in order to minimize the following: 1) the chances of abuse, 2) the appearance of favoritism and 3) the risk of imposing upon a captive audience. *Lehman,* supra at 304. Similarly, prohibiting controversial matter in bill inserts minimizes the following: 1) the abuse of mixing opinion with factual service-related matter, 2) the impression that the utility's views (or the views of an opposing party) are favored by the Commission and 3) the risk of imposing upon captive ratepayers.

The contested Commission order can also find support in the *Lehman* dissent written by Mr. Justice Brennan. Justice

Brennan said that "the Court must assess the importance of the primary use to which the public property or facility is committed and the extent to which that use will be disrupted if access for free expression is permitted." *Lehman*, supra at 312. Here, the Commission has never sanctioned the use of bill inserts for controversial issues, and in fact limited its use to service-related matters. That 'primary use' would clearly be disrupted to the extent that the insertion of controversial material either displaces factual information or tends to confuse fact with opinion.

Con Ed attempts to distinguish *Lehman* on the ground that the 'forum' involved there was government-owned property, whereas the billing mechanism is Con Edison's "own property." (Appellant's Brief, p. 16). This contention is refuted by statute and by definitive decision of New York's highest court. *Consolidated Edison v. Public Service Commission* 47 NY 2d 94 (1979). The New York Public Service Law gives the Commission plenary supervisory powers over all property, real and personal ". . . used or to be used . . . in connection with or to facilitate the . . . sale or furnishing of electricity for light, heat or power." N.Y. Pub. Serv. Law §66(1), 2(12). (The Commission is given equal power over property used to provide gas service. N.Y. Pub. Serv. Law §§66(1) and 2(10).) In addition, the Commission has the power to regulate the format and informational requirements of bill inserts. N.Y.S. Pub. Serv. Law §66(12-a). The Court of Appeals has ruled that this power extends to all contents of the billing envelope. Thus, the distinction of private versus government-owned property is inapposite. The pertinent inquiry is whether, given the Commission's regulatory authority over bill inserts, this particular order violates Con Edison's right of free speech. It does not violate Con Edison's right of expression because, as in *Lehman*, "No First Amendment forum is here to be found." *Lehman*, supra at 304.

IV. THE PUBLIC SERVICE COMMISSION EXERCISED REASONABLE DISCRETION IN LIMITING THE BILL INSERT MECHANISM TO THE COMMUNICATION OF SERVICE-RELATED INFORMATION.

Had the Commission allowed utilities to disseminate their controversial views in the bill inserts, there would have unquestionably arisen a requirement to allow other persons access in a manner that is not arbitrary, capricious or invidious. *Lehman*, supra at 303. If the state allows one party access to a medium or facility it controls, it must allow access to those with opposing viewpoints. ". . . [G]overnment must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prevent others from assembling or speaking on the basis of what they intend to say." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); see also, *East Meadow Community Concerts Association v. Board of Education* 18 NY2d 129 (1966).

Nevertheless, Con Edison construes the Commission's action as applying only to utilities: "The ban applies only to utilities and to no one else." (Appellant's Brief, p. 16). In fact, the Commission held that no one — neither utilities nor ratepayers — could use the bill insert for the expression of controversial matters. In its Order denying petition for rehearing, the Commission expressly stated that consideration was given to allowing access to all, but that option was rejected:

> . . . [W]e were all convinced ultimately that [access to all] would be difficult to administer fairly, and would tend to lessen undesirably, the number of bill inserts dealing directly with such useful and uncontroversial information as consumer conservation measures. (J.S. App. 66a, 67a).

Clearly, the Commission's policy was not adopted to penalize utilities, but as a reasonable measure to preserve the bill insert as an informational device and to assure simplicity and clarity in the communication of service-related information.

V. CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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